

CHAPTER ONE

SYNOPSIS OF THE STATUTORY AND REGULATORY REQUIREMENTS OF THE NPDES PROGRAM

A. Statutory Scheme

Congress established the NPDES program when it enacted the Federal Water Pollution Control Act (FWPCA) Amendments of 1972. Section 402 of that Act requires EPA to administer a national permit program to regulate discharges of pollutants into the waters of the United States and sets out the basic elements of that program.

The Act also allows States to request authority to administer the program in lieu of EPA. While the FWPCA does not explicitly require a State to apply for NPDES approval, the legislative history clearly reflects a Congressional intent that States be primarily responsible for administering the program. Under Section 402(b), EPA must approve a State's request to operate the permit program once it determines, after an independent review of the submission, that the State has adequate legal authorities, procedures, and the ability to administer the program. Section 402 also delineates the requirements for a State program submission and establishes the basic authorities which must be contained in a State program.

EPA is also directed by section 304(i) of the FWPCA to adopt procedural and programmatic requirements for State NPDES programs, including guidelines on monitoring, reporting,

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enforcement, personnel, and funding; and to develop uniform national forms for use by both EPA and approved States. Minimum State program requirements also include a prohibition against interested persons serving on a State permitting agency's board of directors or other body which approves all or portions of NPDES permits. Finally, at all times following approval, State programs must be consistent with minimum federal requirements, although they may always be more stringent. If a State program does not remain consistent, the Administrator may, after hearing, withdraw program approval.*

In 1977, the FWPCA was amended by the Clean Water Act Amendments of 1977. The resulting statute, codified at 33 U.S.C. §1251 et seq., is popularly known as the Clean Water Act (CWA). These amendments resulted in more comprehensive regulation of pollutant discharges with increased emphasis on the control of toxic pollutants. The amendments also mandate that States seeking NPDES authority must seek approval to administer a State pretreatment program and demonstrate that they have the authority under State law to regulate discharges from federal facilities located within the State.

In addition to imposing these requirements on new States seeking NPDES authority, the 1977 Amendments required

*/ Note that the 1972 Act contained no requirement for States to develop pretreatment programs. Also, State programs could not regulate federal facilities within the State (See, EPA v. State Water Resources Control Board, 426 U.S. 200 (1979) noted in Appendix C).

States already approved to administer the NPDES program to develop pretreatment programs (see, section 54(c)(2) of the amendments). Since the CWA specifically required federal facilities to comply with applicable State requirements, State programs were also required to obtain federal facilities authority as well [See, Memorandum on "State Regulation of Federal Facilities" (Policy No. N-78) reproduced in Appendix A]. (See also, 40 C.F.R. §123.62(a)(4), 44 Fed. Reg. 32854, June 7, 1979). Although these requirements have been in effect for eight years, many States still have not modified their programs as required by the CWA.

B. Regulatory Scheme

Pursuant to its authority under section 304(i) of the statute, EPA promulgated initial State program regulations in 1972 (40 CFR Part 124, 37 Fed. Reg. 28390, December 18, 1972). EPA has revised its NPDES program regulations several times since then to clarify EPA policy, implement statutory changes, and reflect the outcome of legal challenges to the regulations (such as court decisions and settlement agreements). The most extensive of these revisions occurred in 1979 (44 Fed. Reg. 32854, June 7, 1979) and 1980 (45 Fed. Reg. 33290, May 19, 1980).

The 1979 revisions to the NPDES regulations expanded and clarified the regulations in response to the 1977 CWA amendments. Revisions included changes to the definition of "person" so as to encompass federal facilities, thus requiring

State programs to include authority to regulate these dischargers. Specific requirements relating to permit application forms, reflecting the increased emphasis on toxic pollutants, were also added. The revised NPDES regulations also created a class of permits known as general permits. Under the general permit program, one permit may be issued which regulates similar dischargers in a defined geographic area with the same effluent limitations. By covering numerous dischargers with one permit, the permitting authority can realize savings in time and resources otherwise expended if individual permits were issued to each discharger. While States are not required to seek general permit authority, as with other aspects of the federal program, a State is not automatically authorized to issue such permits, but must first request and receive approval of a program modification.

The 1980 revisions consolidated the permitting requirements of the NPDES program, the Hazardous Waste Management program under the Resource Conservation and Recovery Act (RCRA), the Underground Injection Control (UIC) program under the Safe Drinking Water Act (SDWA), the State Dredge or Fill (404) program under the CWA, and the Prevention of Significant Deterioration (PSD) program under the Clean Air Act. Consolidation was expected to streamline permitting application and issuance procedures in cases where a permittee would be subject to the requirements of more than one of the above programs.

In addition to the consolidation, the 1980 revisions added new provisions establishing minimum guidelines for public participation in State enforcement activities,* and expanded the application and reporting requirements for toxic pollutants. Finally, the consolidated regulations contained more detailed provisions regarding public notice and hearings. To reflect these revisions, EPA required that all State programs be modified within two years to incorporate the changes. To date, no State has requested program modification as required, although several States have made the necessary revisions. Since the Consolidated Permit Regulations, EPA has promulgated several other revisions, although most do not require extensive changes to approved programs.

On April 1, 1983, EPA promulgated new "deconsolidated" regulations for the NPDES program (48 Fed. Reg. 14146). While this revision changed the format of the NPDES regulations, it offered no substantive changes in the federal requirements. Table One indicates other recent changes to the NPDES Regulations.

Table One

Recent NPDES Revisions

<u>Date</u>	<u>Cite</u>	<u>What</u>
9/1/83	48 Fed. Reg. 39611	"Common Issues" Settlement Agreement

*/ This change came as a result of the holding in Citizens for a Better Environment v. EPA, 596 F.2d 720 (7th Cir. 1979) (See Appendix B).

Table One Continued

6/25/84	49 Fed. Reg. 25978	Compliance extension for 301(k) innovative technology.
8/8/84	49 Fed. Reg. 31841	Delays submission of certain application data.
9/20/84	49 Fed. Reg. 37007	Causes for permit modification based on secondary treatment.
9/26/84	49 Fed. Reg. 37998	NPDES Settlement Agreement.
2/19/85	50 Fed. Reg. 6939	Corrections.
6/3/85	50 Fed. Reg. 23382	Secondary Treatment.
8/26/85	50 Fed. Reg. 34648	State program reporting requirements.

Pursuant to the Clean Water Act Amendments of 1977, EPA also promulgated general pretreatment regulations on June 26, 1978 (43 Fed. Reg. 27736). These rules regulate the introduction of pollutants to publicly owned treatment works (POTWs). All new State NPDES program submissions must include a pretreatment program. Similarly, EPA's general pretreatment regulations require existing State NPDES programs to be modified by March 27, 1980, to assume pretreatment authority over indirect dischargers. Table Two indicates the revisions to the General Pretreatment Regulations since their adoption.

Table Two

Recent Pretreatment Revisions

<u>Date</u>	<u>Cite</u>	<u>What</u>
1/28/81	46 Fed. Reg. 9404	Comprehensive revision.
2/10/84	49 Fed. Reg. 5131	Suspension of "new source," "pass through" and "interference" definitions.

Table Two Continued

7/10/84	49 Fed. Reg. 28058	"New Source" redefined
8/3/84	49 Fed. Reg. 31212	Removal Credits
9/25/85	50 Fed. Reg. 38809	Scope of FDF (PT) Variances

The current NPDES and pretreatment regulations contain the minimum criteria necessary for judging the sufficiency of a proposed State program. The regulations outline the elements of a State program submission and describe the requirements of activities such as permit issuance, compliance monitoring, enforcement, legal authorities, resources and State agency organization. State NPDES programs must meet these minimum requirements, although they may be more stringent. These regulatory requirements are discussed in detail in the following chapters of this guidance.

C. History of State NPDES Program Approvals

The first State NPDES program to be approved was California, on May 14, 1973. By the end of 1975, EPA had approved 28 State programs. An additional two programs were approved by the end of 1977. Thus, 30 State programs were approved before the 1977 CWA amendments went into effect. Of these 30 States, some have complied with the CWA requirements and updated their legal authorities although as of 1985, none had requested approval of their modifications as required. Most, but not all, these States have requested and received pretreatment and federal facilities approval as required. The first State to be approved for

pretreatment was Minnesota, on July 16, 1979, and the first State to be approved for federal facilities authority was California, on May 5, 1978.

At present, EPA has approved 37 State NPDES programs. Of these, 22 have been approved to administer pretreatment programs and 28 have been approved to regulate federal facilities. In addition, nine States have been authorized by EPA to issue general permits. (The approved NPDES States are listed in Volume II.)

The fact that so many programs were approved before the 1977 CWA amendments and the 1979 revisions to the regulations has resulted in serious consistency problems. Until now, EPA has been unable to undertake a systematic evaluation and review of legal authorities in approved States. Although the CWA and the NPDES regulations require that States update their legal authorities to remain consistent with federal requirements, few States have done so. In addition, since EPA has not had the resources to perform reviews of the approved States, the complete scope of this problem is not known. This problem is discussed further under Oversight, below, and in Chapter VI.

D. Oversight

Upon EPA approval, the State takes over primary responsibility for issuance of permits and administration of the NPDES program in that State. Day-to-day program operation is the State's function. The approved State must continue to comply with all applicable requirements of the CWA and NPDES regulations.

Once EPA approves a State program, EPA's involvement is much more limited. EPA continues to provide legal and technical assistance in permit issuance and program administration and retains an active role in enforcement, although the State has primary responsibility for these activities. The Agency also supports State programs through federal grant funding under sections 106, 205(g) and 205(j) of the CWA. Of course, EPA continues to establish rules and develop effluent guidelines and pretreatment standards for direct and indirect dischargers. In large part, however, the federal role is to oversee State programs.

The CWA mandates an oversight function for EPA to ensure that State programs are at all times in conformity with federal requirements. In the past, EPA has carried out its oversight responsibilities largely through review of State-issued permits, annual negotiations relating to federal funding and State program performance, program audits and analysis of State enforcement and monitoring activities. However, EPA is also responsible for ensuring that State programs continue to meet the minimum criteria for legal authority and program performance. The Agency plans to direct an increased part of its resources and efforts to oversee these important elements.

Most of the State programs were approved at least eight years ago. However, not all of these programs have been reviewed since their initial approval by EPA, despite changes in both EPA and State statutes and regulations. As part of

EPA's program to meet its oversight obligations, the Agency has developed a program for the review of State statutory and regulatory authorities to assure that approved States have authority that satisfies the minimum federal requirements for State programs. These reviews will be carried out jointly by EPA Regions and Headquarters. Each review will be a comprehensive review of the State's statutory and regulatory authorities. States found to have inadequate authorities will be notified and are expected to amend their legal authorities promptly to conform with the federal requirements. The procedures for State legal reviews are discussed in detail in Chapter 2.